



Comptroller General
of the United States

Washington, D.C. 20548

U. Anderson

Decision

Matter of: PSC, Inc.

File No.: B-236004

Date: October 26, 1989

DIGEST

1. Protest against agency decision to compare cost of contracting for audiovisual services with estimated cost of performing the services in-house is untimely where solicitation advised potential offerors of intended procedure, and protester failed to object prior to submission of initial offer.
2. Agency determination of the size of its governmental in nature staff, which is treated as a "wash cost" for cost comparison purposes, is largely a management decision involving judgmental matters that are inappropriate for General Accounting Office review.
3. Agency properly excluded from in-house cost estimate the cost of support personnel whose positions would not be eliminated if a contract were awarded; cost comparison procedures require inclusion in estimate only of costs for positions that would be eliminated.

DECISION

PSC, Inc., protests the determination by the Department of the Army, Fort Bliss, Texas, pursuant to Office of Management and Budget (OMB) Circular A-76, that the agency can operate training and audiovisual support services at Fort Bliss for less than the cost offered by the protester under request for proposals (RFP) No. DABT51-87-R-0243. The protester alleges that the agency improperly conducted the cost comparison that justified this decision.

We dismiss the protest in part and deny it in part.

In 1983, the agency made a determination to award a contract for performance of audiovisual support services at Fort Bliss, following a cost comparison conducted under OMB

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Circular A-76. On September 30, 1984, because of poor performance by the contractor, the agency declined to exercise its option to continue that contract, but created a new work force, composed primarily of temporary government employees, to insure performance of audiovisual services until such time as a new contract could be awarded. On December 28, 1986, the agency issued a new solicitation for audiovisual support services as a small business set-aside; the agency received no responses by the closing date for receipt of initial proposals, which was May 15, 1987.

On December 28, 1987, the agency issued the instant unrestricted RFP for those services; the solicitation provided for selection of that proposal representing the best overall performance and realistic price to use for a cost comparison. The RFP advised prospective offerors that after adjusting the successful proposal to compensate for costs incurred as a consequence of contracting, such as "one-time conversion costs," including severance pay and employee retraining, the agency would compare that proposal with a previously prepared in-house government cost estimate. The RFP advised further that if the adjusted contract price were lower than the in-house estimate, the agency would award a firm, fixed-price contract for the services for a 7-month base period with four 1-year options. After evaluating the initial proposals received on April 20, 1988, and the best and final offers submitted on October 17, the agency selected the protester for the cost comparison.

The in-house cost estimate was found to be lower than the protester's offer, exclusive of any 10-percent conversion differential required by OMB Circular A-76.^{1/} The agency's higher headquarters disagreed, however, with Fort Bliss' belief that the 10-percent conversion differential should be charged against the protester's contract price. Headquarters felt that since the agency had conducted no cost comparison since the decision made in 1983 to perform

^{1/} Chapter 4, paragraph A., of OMB's Cost Comparison Handbook requires that in comparing the costs of in-house performance with the costs of contracting out, the agency should add to the contractor's bid a factor equal to ten percent of in-house personnel related costs, to represent the costs of retained pay and other disruption resulting from replacement of a government work force with a contractor work force. A similar amount is required to be added to the in-house estimate when the comparison involves an activity that is currently under contract; this factor includes some contract termination costs and reflects a preference for maintenance of the status quo.

the work by contract, the agency had never justified its decision to perform the work in-house; as a consequence, the services were technically a contract activity, and the conversion differential should be charged against the in-house estimate. As a result, the outcome of the cost comparison changed, from an in-house advantage to an advantage in contracting with the protester.

The agency appealed this decision to the Secretary of the Army (Installations and Logistics), whose staff initially concurred with the agency's higher headquarters but who ultimately directed the agency to apply the differential against the contractor's offer, as contemplated by the solicitation. The failure to apply the differential to the government estimate resulted in a decision to have the work done in-house. The protester administratively appealed the cost comparison decision on May 11, and this protest followed the denial of that appeal by the Fort Bliss appeals board.

The protester first challenges the agency's right to submit an in-house estimate, since the OMB Circular allegedly precludes such action where a satisfactory contractor has offered to perform the work at a reasonable price. The protester also challenges the agency's decision to apply the 10-percent conversion differential against its offer. The protester argues that with temporary government employees currently performing the work, the cost of retained pay would be minimal since the Civil Service system offers little job protection to such employees. The protester believes that the decreases in efficiency for which the 10-percent differential compensates will not occur, since it intends to hire most of the current work force, which formerly worked for the previous contractor; it predicts that the process of making the temporary work force into a permanent one would create the greater cost. Accordingly, the protester contends that the 10-percent differential, at the very least, "should be treated as a wash."

We note initially that the protester's contention that the agency was not eligible to compete for the work under study is clearly untimely under our Bid Protest Regulations, 4 C.F.R. § 21.1 (a)(1) (1989), which requires that protests based upon alleged improprieties apparent prior to the date for receipt of initial offers must be filed prior to the receipt of initial offers. Accordingly, since the RFP stated that the government would compete by submitting an

in-house estimate, the protest ground is untimely and we dismiss it.^{2/}

Concerning the application of the differential against the protester's offer, we note that the decision whether to perform work in-house or by contract involves a matter of executive branch policy which we generally do not review under our bid protest function. Where, however, as here, an agency uses the procurement system to aid its decision--soliciting offers and spelling out the circumstances under which a contract will or will not be awarded--we will review an allegation that the agency did not comply with the ground rules established by the solicitation. Joule Maintenance Corp., B-210182, Sept. 29, 1983, 83-2 CPD ¶ 389.

Here, the RFP specifically provided, as noted above, that the agency would prepare and submit an estimated cost for in-house performance, to be used in the cost comparison. We also find that the solicitation indicated that the agency intended to conduct a standard cost comparison in the usual manner, which generally includes adding the conversion differential to the successful offeror's price. The agency therefore apparently conducted the cost comparison in accordance with the terms of the RFP when it applied the differential against the protester's offer.

The protester argues, however, that in the peculiar circumstances associated with the Fort Bliss work force, the agency nevertheless should not have applied the 10-percent differential against PSC's offer since the government would not incur the liability for severance pay and retraining that it normally does when it converts an activity from in-house to contract performance.^{3/} We find it unnecessary to address this contention, since even if the agency had treated conversion costs as a "wash", as requested by the

^{2/} In any event, the agency has provided our Office with a copy of the approval granted in 1986 to allow the in-house work force to participate in the cost comparison.

^{3/} In its final comments submitted to this Office, the protester also argues, for the first time, that the agency should have applied against the in-house estimate certain additional employee benefit costs that will be realized by bringing temporary employees into permanent status. Since the protester did not raise this issue before the agency's appeals board, which is a prerequisite to our consideration of the issue, we will not consider the protester's arguments in this regard. See Apex Int'l Management Servs., Inc., B-228885.2, Jan. 6, 1988, 88-1 CPD ¶ 9.

protester, the agency properly determined, as discussed below, that the cost of performance in-house would be less than the cost of contracting with the protester. Stated differently, if we deny, as we do, the protest issues concerning governmental in nature (GIN) work force and overhead costs, infra., the record shows that applying or not applying the differential against the protester's offer does not affect the decision to retain the work in-house since the in-house cost estimate was lower than the protester's offer exclusive of the 10 percent conversion differential.

The protester also challenges the agency's failure to include the costs of its GIN work force in the in-house estimate. For example, the protester notes that the government estimate provides for three supply clerks for the audiovisual services but includes only two clerks in its cost proposal. Similarly, the protester points out that the solicitation requires that the contractor provide a project manager, but that the in-house estimate contains no such position. The protester also argues that many of the positions designated GIN perform purely clerical duties that do not require the exercise of discretionary authority and thus do not meet the definition of "governmental in nature" contained in the OMB circular.

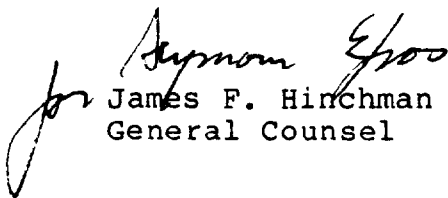
The management study from which the staffing and in-house estimate were derived identified 5 of 53 positions as GIN and therefore excluded from the cost comparison. We have recognized that an agency may properly ignore such positions in a cost comparison, even though they constitute part of the planned in-house organization because the costs are essentially a "wash" as the positions will be needed whether or not the function is contracted out. The decision to exempt these positions from the requirement for periodic cost comparisons is purely a matter of executive policy, and we have consistently recognized that the determination by an agency of the size of a GIN staff and the number of employees required to perform the work under review is largely a management decision involving judgmental matters that are inappropriate for our review. Bara-King Photographic, Inc., B-231916, Oct. 20, 1988, 88-2 CPD ¶ 377.

The protester also challenges the agency's conclusion that even if the work were done by contract, there would be no reduction in overhead; it points out that the omission of even one such position would save a considerable sum over the contract period. In this regard, the cost comparison handbook recognizes that while a portion of support costs are theoretically attributable to the function under study, the cost comparison should only show calculations of support

costs that would be eliminated in the event the function is contracted. The agency has in this instance polled the various staff agencies supporting the audiovisual function and estimates that doing the work by contract will save 27 man-hours per week, or less than 1 full-time position. We cannot therefore find that the procedures set forth by OMB Circular A-76 required that the agency adjust its estimate to recognize any reduction in overhead costs. See Transcontinental Enters., Inc., B-230216.2, Nov. 22, 1988, 88-2 CPD ¶ 501.

The protester's remaining assertions relate to its belief that the agency has overstated the number of contract administrators needed, resulting in an increase in the cost of contracting. Since the amount involved is, however, also less than the difference between the cost of accepting the contractor's offer and the cost of in-house performance (regardless of the differential), we find that the agency properly determined that performing audiovisual services in-house would be less costly to the government than contracting with the protester. Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 500.

The protest is dismissed in part and denied in part.


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General Counsel